NOTICE IN EQUITY

THE doctrine of notice as developed by the English courts of equity is simple, logical, and easily applied,[1] but in this country no other equity topic of equal importance is involved in so great confusion. In the use of terms and in the analysis of the subject the American authorities are in hopeless conflict. For this confusion certain text writers are mainly responsible, and while in their discussions of the subject the judges have followed these authorities, there is little conflict in the actual decisions of the courts. From these decisions it is believed that the doctrine of notice in equity as actually applied by the American courts may be reduced to a simple and logical statement.

Much of the confusion in the discussions of the subject has grown out of the failure to make some very simple distinctions, especially the distinction between notice in equity and notice in some other branches of the law. Notice is sometimes requisite to perfect a right, to fix or to prevent a liability, or to put in default the person to whom notice is given. Instances of such cases of notice are notice to a tenant to quit, notice to fix the liability of an indorser

[1] The English doctrine of notice in equity avoids all the artificial and confusing distinctions introduced by some of the American authorities. Notice, as affecting the *bona fides* of a purchaser is distinguished as express, implied, or imputed, all having the same effect as actual notice in American law. See JENKS' DIGEST, §§ 1314–1317. According to this authority, "A purchaser has express notice, for the purpose of § 1314, of an equitable interest, if, at the time when value was given by him, he was in fact aware of the existence of such interest. He has implied (or constructive) notice of such interest, if he would have discovered its existence, had such inquiries and inspections been made as ought reasonably to have been made by him. He has imputed notice of such interest, if, in the same transaction, such notice in fact came to the knowledge of his counsel, as such, or of his solicitor, or other agent, as such, or would have come to the knowledge of his solicitor, or other agent, as such, if such inquiries and inspections had been made as ought reasonably to have been made by the solicitor or other agent." (§ 1316.) "The inquiries and inspections referred to in § 1316 include: (i) an investigation of the property purchased, for the proper period, i. e., forty years prior to the date of the contract to purchase; (ii) an inspection of the land itself; (iii) an examination of the title deeds." (§ 1317.) See, generally, Jones *v.* Smith, 1 Hare 43 (1841); Espin *v.* Pemberton, 3 DeG. & J. 547 (1859); Ware *v.* Egmont, 4 DeG., M., & G. 460; (1854); Bailey *v.* Barnes, L. R. [1894] 1 Ch. 25.

of commercial paper, notice of loss to be given to an insurer, notice of the revocation of the authority of an agent, and the like. All these are governed by special rules not usually applicable to notice in equity.

Notice in equity is of interest only in connection with the determination of priorities or of the good faith of a party. In most cases the question of notice arises with reference to the right of a subsequent purchaser or creditor to assert his claim to property as against some earlier conflicting claim. This may, and usually does, involve the question of the good faith of such purchaser or creditor. This question may also arise in connection with sales and conveyances alleged to be fraudulent, in which the important point is whether the grantee acquired title with notice of the fraud. In all these cases notice is an essential factor in determining whether the party is a *bona fide* purchaser. So also in the case of an occupant of real estate, the question of his right to recover for improvements made by him as against an adverse claimant, may turn upon whether or not such improvements were made with notice of the adverse claim. In view of the difference in function or effect between notice in equity and some other kinds of notice, discussions of the former should not be complicated by the consideration of special rules applicable only to the latter, but notice in equity should be dealt with as an independent proposition.

The failure to make this distinction has given rise to the notion that there is something artificial or technical in the equitable doctrine of notice, as in the case of other kinds of notice, a notion which has involved the doctrine in much inconsistency and confusion. Occasionally the courts have given countenance to this notion, but it is mainly the work of the text-writers. This is conspicuously true of Mr. Pomeroy, whose discussion of notice is probably the most elaborate to be found in the books. He insists that "it should be most carefully borne in mind that the legal conception of 'notice,' as contained in the settled doctrines and rules of equity, is somewhat artificial and even technical." [2] The value of his discussion is seriously impaired by his approach to the subject from this point of view. As a matter of fact, except in a few instances of constructive notice, there is nothing artificial or technical about the equitable conception of notice. Questions of notice

[2] POMEROY, EQUITY JURISPRUDENCE, § 592, p. 1104.

have been decided by courts of equity in accordance with the principles of plain common sense. Furthermore, any attempt to invest the equitable conception of notice with artificiality or technicality is contrary to the fundamental spirit of equity, which looks at the substance rather than the form, and which, in the accomplishment of its ultimate purpose to do justice, brushes aside all matters of form or technicality except when controlled by statutory requirements.

In this spirit the courts have developed and administered the equitable doctrine of notice. In the words of a California judge,[3]

"The rules in respect to notice to purchasers of adverse titles or claims, other than such as is imparted by the records, are not founded upon any arbitrary provisions of law, but have their origin in the considerations of prudence and honesty which guide men in their ordinary business transactions."

In similar strain an English judge remarks: [4]

"The doctrine of constructive notice is based on good sense, and is designed to prevent frauds on owners of property; but the doctrine must not be carried to such an extent as to defeat honest purchasers; and although this limitation has some times been lost sight of, still the limitation is as important and as well known as the doctrine itself."

I purpose to submit in this paper a brief analysis of the equitable doctrine of notice differing materially from any presentation I have seen, but which I believe has the merit of simplicity and consistency, and which presents the actual doctrine of the courts as exhibited in the decisions made as distinguished from theoretical discussions of the subject. Every position taken in this paper is abundantly supported by direct judicial authority, both in actual decisions and in the language used by the courts, though in some particulars the overwhelming weight of authority as found in textbooks and judicial *dicta* is opposed to the views here expressed. Any originality that may be found in this presentation lies in the analysis and arrangement of the subject and in the interpretation of the decisions; the specific propositions dealt with are elementary and even commonplace.[5] I shall begin with a definition of notice.

[3] Rhodes, J., in Lawton *v.* Gordon, 37 Cal. 202, 206 (1869).

[4] Lord Cranworth in Ware *v.* Egmont, 4 DeG., M. & G. 460 (1854).

[5] I deem it unnecessary to cumber this paper with extended citation of authorities in support of elementary propositions.

Notice in equity is knowledge of a fact either actually possessed by a person or imputed to him by law. The foundation of notice is *knowledge*. It is because the subsequent purchaser knew of the prior unrecorded mortgage that he is held to take subject thereto, and the grantee in a fraudulent conveyance is required to surrender the property to the defrauded creditor because he knew of the fraud. The term knowledge is here used in its ordinary sense, and means actual knowledge. By actual knowledge is meant in equity, as in ordinary use, not absolute certainty, but such a belief in the existence of the fact in question as a reasonably prudent man would act upon in the ordinary affairs of life.[6] Nor does it mean complete knowledge; it is not necessary that a subsequent purchaser or encumbrancer of property should know all the details of a prior adverse title, claim, or right, in order that he take subject thereto; it is enough that he knows that such title, claim, or right exists. With such knowledge he takes subject to whatever the rights of the adverse claimant may be in fact.

Discussions of notice in equity would be greatly simplified if the true nature of such notice as consisting simply of knowledge of the conflicting claim were always kept in mind. Except for a few cases of so-called constructive notice, the term "knowledge" might be substituted for "notice" as being precisely synonymous therewith, and judges in fact frequently use the two terms interchangeably.

Notice is of two kinds, actual and constructive. In general, notice consisting of actual knowledge is actual notice, and notice imputed by law is constructive notice. The recognition of two kinds of notice, actual and constructive, while necessary, is to some extent confusing. Notice as a purely equitable concept is primarily actual notice, the few cases of so-called constructive notice being special cases based upon independent and peculiar grounds. It would be conducive to clearness to omit them entirely from the

[6] The actual notice required by the statutes is not certain knowledge, but such information as men usually act upon in the ordinary affairs of life. Curtis *v.* Mundy, 3 Metc. (Mass.) 405 (1841); Vaughn *v.* Tracy, 22 Mo. 415 (1856).

The words "actual notice" do not always mean in law what in metaphysical strictness they import. They more often mean knowledge of facts and circumstances sufficiently pertinent in character to enable reasonably cautious and prudent persons to investigate and ascertain as to the ultimate facts. Pope *v.* Nichols, 61 Kan. 230, 59 Pac. 257 (1899).

discussion of notice in general and treat them separately as special cases. The force of this suggestion will appear when we consider the cases of constructive notice.

The identity of notice and knowledge is denied by leading text-writers, notably Mr. Pomeroy. Thus, after asserting the artificial and technical character of the legal conception of notice, he says: [7]

"In this purely artificial sense, notice is by no means synonymous with knowledge; *although the effects produced by it are undoubtedly the same which would result from actual knowledge.* [Italics his.] In other words, while the doctrines of equity on the subject do not assume that notice *is* knowledge, nor even that it is necessarily followed by knowledge, they still often impute to it the very same consequences which would flow from actual knowledge acquired by the party. As the notice spoken of by the rules is not knowledge, there may be notice without knowledge, and knowledge without notice.

The same distinction is made, though less pointedly, by Mr. Bispham, who says: [8]

"Notice, then, in its technical sense, is the legal cognizance of a fact. It differs from knowledge, for knowledge may exist without notice, and there may be notice without any actual knowledge. Thus a court, in the consideration of a cause, may be bound to take judicial notice of facts of which no actual proof whatever exists; and, on the other hand, a judge or jury may be compelled to disregard known facts, because although proved to exist, they cannot be judicially recognized in the determination of the particular issue. So, also, there may be no technical *notice* of a right or title, although knowledge of the right or title may exist; and again, there may be notice of another's right although there is no knowledge whatever that any such right is claimed."

It is plain that both these distinguished authors are speaking of notice in a general sense. Their statements are not all true of notice in equity. Mr. Bispham, for example, refers to the doctrine of judicial notice in the law of evidence. That there may be notice in equity without actual knowledge is true, as in the case of constructive notice (which, however, is only to a limited extent notice *in equity*), but it is not true in equity that there may be actual knowledge without actual notice. In the law of negotiable instruments there may be knowledge without notice. Notice of dishonor

[7] POMEROY, § 592, p. 1104.

[8] BISPHAM, PRINCIPLES OF EQUITY, § 263.

to bind an indorser must be given by the right party and in proper form or the indorser will not be bound, although he may have actual knowledge that the note was dishonored. In such case actual knowledge is not notice. Text-writers who assert that there may be knowledge without notice in equity have evidently been unconsciously influenced by the rules governing notice in the law of negotiable instruments and similar cases. Certainly no equity judge would hold that a purchaser of land with actual knowledge of a prior outstanding title is in any case a purchaser without notice. Knowledge is always notice in equity, that is, actual knowledge is actual notice.

But is actual notice always actual knowledge? May there not be actual notice without actual knowledge? It must be admitted that the overwhelming weight of authority as found in text-books and judicial opinions is that there may be. Innumerable statements may be found to this effect. In some of the cases, however, in which the court so declares there was in fact actual knowledge. Such cases are therefore authority only for the proposition that actual knowledge is actual notice as held by the court. In some other cases the declaration has reference merely to the character of the evidence by which actual notice may be proved, it being held that actual notice need not be proved with absolute certainty but may be inferred from circumstantial evidence. But after all allowances are made, it remains true that in very many cases it has been held, and rightly held, that a subsequent purchaser may be dealt with as if he were in legal contemplation a purchaser with actual notice although it may be proved that he had no knowledge of the prior claim. It will be seen, however, that these decisions do not necessarily conflict with the position that actual notice and actual knowledge are in equity synonymous terms. Upon this basis, for the present at least, we may define actual notice as follows:

Actual notice in equity is actual knowledge of the prior conflicting interest, claim, or right. It is immaterial how, when, or from whom the party charged with notice acquired his knowledge; [9] it is enough that at the time of acquiring his own interest he knew of the existence of the prior claim. In this connection it should be borne in mind that in some other branches of the law the *giving*

[9] Lawton *v.* Gordon, 37 Cal. 202 (1869); Butcher *v.* Yocum, 61 Pa. St. 168 (1869).

of the proper notice is often the material thing, and especially is it important that the notice should come from the proper source; in equity it is the fact that the party *has* notice when he acquires his title that is material.

Mr. Pomeroy completely misses this point and deals with notice in equity, as a technical conception, as being of the same general nature as notice in the law of negotiable instruments. Thus he says:[10] "Actual notice is information concerning the fact, — as, for example, concerning the prior interest, claim, or right, — directly and personally communicated to the party." Throughout his discussion he distinguishes between information and knowledge, a distinction not made by the courts. Writing of technical actual notice he says:[11]

"Where an actual notice is relied upon, in order to be binding it must come from some person interested in the property to be affected by it; and it is said that it must be given and received in the course of the very transaction itself concerning the property in which the parties are then engaged. As a necessary consequence, no mere vague reports from strangers, nor mere general statements by individuals not interested in the property, that some other person claims a prior right or title, will amount to an actual notice so as to bind the conscience of the party; nor will he be bound by a notice given in some previous and distinct transaction, which he might have forgotten."

From this language it seems clear that Mr. Pomeroy was influenced by the conception of notice as a means of perfecting a right or of putting a person in default.[12] His use of the article before the term is one indication of this. He writes of "an actual notice," and "a notice," and defines actual notice as information "directly and personally communicated to the party." All this is inappropriate to notice in equity. After carefully defining and explaining the technical conception of actual notice in equity, he goes on to explain that the effect of actual knowledge, however and from whomsoever acquired, is usually precisely the same as that of actual notice, "actual notice" being treated "as a representative

[10] POMEROY, § 595.

[11] *Ibid.*, § 602.

[12] Mr. Pomeroy expressly recognizes this distinction in § 603, without, however, perceiving the impropriety of treating notice in equity as if it were subject to the technical rules applicable to some other kinds of notice.

of or substitute for actual knowledge," and "therefore in its essential nature inferior to knowledge." Further, actual knowledge "is often a most essential element in making out a fraudulent intent, where a mere technical notice would not be sufficient." [13] It is submitted that the distinction made by Mr. Pomeroy, which appears not to be recognized by the courts, is of no practical value and tends to confuse the subject.

The existence of actual notice is purely a question of fact, and like any other fact, notice may be proved either (1) directly, by evidence bringing the fact of knowledge of the prior claim home to the party, or (2) indirectly, that is, by circumstantial evidence. Notice directly proved is sometimes called express actual notice, and notice indirectly proved has been called implied actual notice, though these terms are neither very useful nor very appropriate.

Proof of actual notice by direct evidence calls for no special comment. Proof by indirect evidence is effected by proof of facts from which actual knowledge of the outstanding claim may be inferred. The indirect evidence may come under one or the other of three heads. (1) The fact of notice may be established by proof of circumstances showing that the party had the opportunity of learning of the outstanding claim, and from this it may be inferred that he learned of it.[14] (2) There may be circumstances of general notoriety pointing to the existence of the prior claim, and of these circumstances the party may be presumed to be cognizant.[15] (3) It may be proved that the party knew of facts or circumstances sufficient to put a reasonable man upon inquiry as to whether there was not some prior adverse claim to the property, which facts or circumstances, if investigated, would probably have led to actual knowledge of the prior claim.

Notice based upon knowledge of facts or circumstances putting one upon inquiry is one of the most familiar and important instances of notice.[16] Upon proof of such knowledge four possible

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[13] POMEROY, § 603, p. 1139.

[14] Such as close relationship, personal intimacy, or business connections between the subsequent purchaser and the holder of the adverse claim. See POMEROY, § 600.

[15] For example, the dedication of a street, the laying out of a town, etc. See Rowan *v.* Portland, 8 B. Mon. (Ky.) 232 (1847); Carter *v.* Portland, 4 Ore. 339 (1873).

[16] As to actual notice arising from facts putting one upon inquiry, see Clarke *v.* Ingram, 107 Ga. 565, 33 S. E. 802 (1899); Field *v.* Campbell, 36 Ind. App. 549, 67 N. E. 1040 (1903); Phillips *v.* Reitz, 16 Kan. 396 (1876); Charles *v.* Whitt, 218 S. W.

cases may arise: (1) The evidence may show further that the party made the inquiry called for in the circumstances and actually learned of the prior claim. In such case he has actual knowledge and hence actual notice, and this case is brought under the head of actual notice directly proved. (2) It may be shown that the party made the proper inquiry and nevertheless failed to obtain knowledge of the prior claim.[17] Such failure may result from the party's receiving some other satisfactory explanation of the facts suggesting the existence of an adverse claim, or from the insufficiency or untruth of the replies made by the adverse claimant upon inquiry, or from other cause. In any case where after due inquiry the party fails to learn of the prior claim, he cannot be charged with notice. (3) The party may have made no inquiry or an insufficient inquiry, and so in fact failed to learn of the adverse claim. (4) The evidence may prove only that the party knew of the facts or circumstances putting one upon inquiry, there being no evidence as to whether he made inquiry or not. These last two cases are the troublesome ones and call for special examination.

The case where there has been no inquiry, or an insufficient inquiry, is a very common one and has often been considered by the courts. In such case the party, of course, does not acquire knowledge of the prior claim, and if actual knowledge is literally required to constitute actual notice, the party has no actual notice. Without exception, so far as the writer knows, all the authorities hold that the subsequent purchaser in such case takes subject to the prior claim, but they do not agree as to the precise ground upon which it is so held. Usually the party is deemed to be a purchaser with notice, but not infrequently the decision of the court is based in part at least upon the purchaser's want of good faith in not making the inquiry called for in the circumstances.[18]

(Ky.) 994 (1920); Connecticut Mut. Ins. Co. *v.* Smith, 117 Mo. 261, 22 S. W. 623 (1893); Morrison *v.* Juden, 145 Mo. 282, 46 S. W. 994 (1898); Levins *v.* W. O. Peeples Grocery Co., 38 S. W. (Tenn.) 733 (1896).

For exceptionally fine opinions on this subject, see Knapp *v.* Bailey, 79 Me. 195, 9 Atl. 122 (1887); Drey *v.* Doyle, 99 Mo. 459, 12 S. W. 287 (1889); Williamson *v.* Brown, 15 N. Y. 354 (1857); Pringle *v.* Dunn, 37 Wis. 449 (1875); Brinkman *v.* Jones, 44 Wis. 498 (1878).

[17] Jones *v.* Smith, 1 Hare 43 (1841); Espin *v.* Pemberton, 3 DeG. & J. 547 (1859); Williamson *v.* Brown, 15 N. Y. 354 (1857); Kelly *v.* Fairmount Land Co., 97 Va. 227, 33 S. E. 598 (1899).

[18] Wilson *v.* Miller, 16 Iowa 111 (1864); Knapp *v.* Bailey, 79 Me. 195, 9 Atl.

The purchaser may fail to make the proper inquiries either wilfully, as where, being afraid that he might find something the matter with the title, he abstains from making inquiry in order that he may avoid notice, or his failure may be due to negligence. In either case the effect is the same. He is not a *bona fide* purchaser without notice. That he is not a purchaser in good faith is clear, and this of itself is enough to postpone his rights to those of the prior claimant. Knowing of facts suggesting the existence of a prior adverse claim, he is charged with the duty of making the proper inquiry. This duty, however, he owes not to the prior claimant but to himself. If he wishes to claim as a *bona fide* purchaser he must act in good faith; he must make the proper inquiry or take the consequences.[19]

The prevailing view, however, is that in such case the purchaser should be deemed a purchaser with notice. Where, as is usually the case, actual and constructive notice have the same effect, it is immaterial whether the notice with which he is charged be classed as actual or constructive; but where it is necessary to prove actual notice in order to postpone the subsequent purchaser, it will not suffice to call this constructive notice. If notice is relied upon by the prior claimant, it must be actual notice. Otherwise the subsequent purchaser might avoid the burden of a prior claim of the existence of which he has some evidence by omitting to make the proper inquiries, thus profiting by his own wrong. Usually the courts call this constructive notice, meaning a notice which is not actual knowledge but which is imputed by law. This is reasonable and is accurate enough where proof of actual notice is not required. But to meet the full requirements of the situation the notice should be called actual or notice should be eliminated entirely and the prior claimant should rely upon the purchaser's want of good faith, or invoke the doctrine of estoppel.

Mr. Pomeroy calls this actual notice. He says:[20] If "it appears

122 (1887); Pringle *v.* Dunn, 37 Wis. 449 (1875); Brinkman *v.* Jones, 44 Wis. 498 (1878).

In Knapp *v.* Bailey, *supra*, p. 203, the court said: "It amounts substantially to this, that actual notice may be proved by direct evidence, or it may be inferred, or implied, (that is, proved) as a fact from indirect evidence — by circumstantial evidence. A man may have notice or its legal equivalent. He may be so situated as to be estopped to deny that he had actual notice."

[19] See Bailey *v.* Barnes, L. R. [1894] 1 Ch. 25, 35.

[20] POMEROY, § 597.

that the party has knowledge or information of such facts sufficient to put a prudent man upon inquiry, and that he wholly neglects to make any inquiry, or having begun it fails to prosecute it in a reasonable manner, then also the inference of actual notice is necessary and absolute." This, of course, would be actual notice without actual knowledge. In England, where the distinction between actual and constructive notice is ordinarily immaterial, the notice in this case is usually called constructive or implied notice. So far as the writer knows there is no American case in which under a statute requiring actual notice a purchaser who has failed to make the proper inquiry is held to be a purchaser without notice. This means, of course, that there may be actual notice within the meaning of such a statute without actual knowledge, provided notice is relied upon as postponing the rights of the subsequent purchaser.

But in the present case, while the purchaser did not have actual knowledge of the prior claim, it was his own fault that he did not have such knowledge. He had the means of obtaining knowledge, and, in the words of Mr. Justice Strong,[21] "means of knowledge, with the duty of using them, are, in equity, equivalent to knowledge itself." Or as an English judge puts it:[22] "A person who ought, according to the rule of courts of equity, either personally or by his agent to have known a fact is treated in equity as if he actually knew it." He adds, however, "and he cannot escape the consequences of this constructive notice by employing a dishonest solicitor," thus terming the notice constructive notice, which, however, in the case before him served as well as actual notice. It will be observed that the means of knowledge are in equity equivalent not to notice but to *knowledge*, and the party is held to have actual notice because he has the legal equivalent of knowledge. But it is a serious mistake to call this constructive notice, which, under statutes requiring actual notice, will not suffice unless the term "constructive" is here used to denote a special kind of actual notice, which, of course, introduces confusion.[23]

[21] Cordova *v.* Hood, 17 Wall. (U. S.) 1, 8 (1872).

"[Notice] is actual when the purchaser either knows of the existence of the adverse claim or title, or is conscious of the means of knowing, although he may not use them." Speck *v.* Riggin, 40 Mo. 405 (1867).

[22] Joyce, J., in Berwick *v.* Price, L. R. [1905] 1 Ch. 632.

[23] In Kirkham *v.* Moore, 30 Ind. App. 549, 65 N. E. 1042 (1903), decided under a

In the opinion of the writer it would be better not to call this a case of notice at all, but, for the purpose of postponing the subsequent purchaser, to rely upon the principle of estoppel or the purchaser's want of good faith. Since it was his own fault that the purchaser did not have actual notice, he is estopped to set up the want of such notice. This satisfies the requirements of the case and avoids the practical difficulty resulting from the adoption of a technical definition of actual notice as distinct from actual knowledge, or from a special use of the term "constructive" to denote a variety of actual notice. However, as the principal thing is to get rid of this improper use of the term "constructive," it is not necessary to insist upon the complete identification of actual notice and knowledge, and we may frame our definition somewhat differently as follows: Actual notice in equity of a prior interest, claim, or right is actual knowledge thereof, either in fact possessed by the party to be charged or by his agent, or which but for the fault of such party or agent might have been so possessed.

The fourth case of notice based upon knowledge of facts or circumstances putting one upon inquiry is less complicated. Where it is shown only that the party knew of such facts and circumstances, and there is no evidence as to whether or not any inquiry was made, it will be found as a matter of fact that the party had actual knowledge, and hence actual notice, of the prior claim. Upon proof of knowledge of facts putting one upon inquiry, it will be inferred that the subsequent purchaser did what any reasonably prudent man would have done in the circumstances and made the proper inquiry, and thus actually learned of the prior claim. In the absence of evidence to the contrary, this is the legitimate and natural inference of fact. The purchaser either made the inquiry or he did not; if he made it, presumably he obtained actual knowledge of the prior claim; if he did not make it, he is not a purchaser

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statute requiring actual notice, the proposition that knowledge and actual notice are synonymous was expressly denied. In this case the prior claimant was in open, visible, and exclusive possession of the land in question, and it was held that the notice conveyed by such possession was sufficient to satisfy the statutory requirement, the court remarking: "It can make little difference whether the notice thus given is denominated 'constructive,' or 'implied'; it is none the less effectual." The precise terms of a statute seem unimportant when so loosely dealt with. In this case the possession was held sufficient to put the purchaser upon an inquiry, which, if made, would have led to actual knowledge of the prior claim.

in good faith and is estopped to set up the want of actual notice. Under either alternative he loses. This was well put in a leading case as follows: [24]

"The true doctrine on this subject is, that where a purchaser has knowledge of any fact, sufficient to put him on inquiry as to the existence of some right or title in conflict with that he is about to purchase, he is presumed either to have made the inquiry, and ascertained the extent of such prior right, or to have been guilty of a degree of negligence equally fatal to his claim, to be considered as a *bona fide* purchaser. This presumption, however, is a mere inference of fact, and may be repelled by proof that the purchaser failed to discover the prior right, notwithstanding the exercise of proper diligence on his part."

This doctrine was well stated also by the Missouri court in a case arising under a registration statute providing that, "No such instrument in writing shall be valid except between the parties thereto, and such as have actual notice thereof, until the same shall be deposited with the recorder for record." The court said: [25]

"The actual notice required by the statute is used in contra-distinction to the constructive notice given by a record. It does not mean that there must necessarily be direct and positive evidence that the subsequent purchaser actually knew of the existence of the deed. Any proper evidence tending to show it — facts and circumstances coming to his knowledge that would put a man of ordinary circumspection upon inquiry — should go to the jury as evidence of such notice. The second sale by one who has already conveyed the property is necessarily fraudulent; and if it appears in evidence that the purchaser knows that the holder of the unrecorded deed is in possession of the property as owner, or that he is informed that such holder has bought the property, the jury has a right to infer full knowledge or voluntary ignorance; and if he buy with such knowledge, or such means of knowledge, he becomes a party to the fraud, and will not be permitted to take advantage of it. [Authorities.] Proof of actual knowledge of the existence of the former deed has never been held to be necessary; but the jury has the right to infer such knowledge from facts that would naturally suggest it; and from which the actual relation of the prior purchaser of the land might be reasonably inferred."

It is in connection with the distinction between actual and con-

[24] *Per* Selden, J., in Williamson *v.* Brown, 15 N. Y. 354, 362 (1857).

[25] *Per* Bliss, J., in Maupin *v.* Emmons, 47 Mo. 304 (1871). See also Drey *v.* Doyle, 99 Mo. 459, 12 S. W. 287 (1889).

structive notice that most of the confusion in discussions of notice is found. As already stated, notice in equity is primarily and usually actual notice, and consists of actual knowledge either in fact possessed by the party or his agent, or which but for the fault of himself or of his agent he might have possessed. In English law, except notice by registration and by *lis pendens*, no other kind of notice is recognized in equity. The term "constructive notice" is frequently applied to the notice with which one is charged who did not in fact personally know of the prior claim, but who had the means of obtaining knowledge which he failed to use, or who acted through an agent who had such knowledge. This kind of notice is also called "imputed" or "implied" notice, these terms being used as synonymous with "constructive." But in all these cases notice in English law is based upon actual knowledge or its legal equivalent. Where it was the subsequent purchaser's own fault that he did not have actual knowledge, he is not a *bona fide* purchaser without notice. In such case it is perhaps more logical to treat him as a purchaser in bad faith rather than a purchaser with notice, but the same result will, of course, be reached in either case,—he will take subject to the prior claim.

For practical purposes usually no harm is done by treating a purchaser whose want of knowledge of the prior claim is due to his own fault as a purchaser with constructive notice, as is customary, but this will not suffice under statutes or conditions making actual notice necessary. It is only where the effect of actual and constructive notice is the same that the distinction between the two kinds becomes unimportant. Since actual and constructive notice usually have the same effect in postponing the rights of the subsequent claimant, it is not surprising that the courts are not careful to distinguish precisely between the two kinds of notice, and often use the terms actual notice and constructive notice almost interchangeably with resulting confusion in terminology. But wherever the effect of actual notice, in the sense of actual knowledge, and constructive notice, meaning technical notice irrespective of actual knowledge, is not the same, it becomes important to distinguish with precision between actual and technical notice. The distinction, as suggested, is between knowledge and a technical notice not based on knowledge.

The distinction is necessary in two general classes of cases:

(1) where it is necessary to fix upon a party a charge of bad faith. In such case the notice of the prior claim must be such as to affect the conscience of the party; a mere technical or constructive notice will not suffice. The party must have actually known of the prior conflicting claim when he acquired his own interest, or he must have had the means of knowledge. Cases of this sort arise where the grantee in a fraudulent conveyance knew or could have known of the fraud on creditors, or where an occupant of real property makes improvements on the property with actual or potential knowledge that another claims the property. So also under a statute making unrecorded interests void as to subsequent purchasers and encumbrancers, without excepting subsequent claimants with notice, a subsequent purchaser who purchases with actual notice of a prior unrecorded claim, takes subject thereto on the ground that he purchased in bad faith. (2) Proof of actual notice is also necessary under statutes providing that unrecorded interests are void except as against subsequent purchasers, etc., "with actual notice." These statutes are fairly common in the United States. Under these, and similar statutes expressly providing for actual notice, it is essential to distinguish accurately between actual and constructive notice.

Actual notice has already been defined as actual knowledge or its legal (and moral) equivalent; and, as already stated, constructive notice is not a sub-division of notice equal in dignity to actual notice. With the exception of notice imparted by registration, which is statutory and not a creature of equity, the few special cases of notice falling under the head of constructive notice are comparatively unimportant. All of these may be included under the following definition:

Constructive notice is notice imputed by law without any reference to whether the party charged therewith had or might have had actual knowledge or not. It is based upon the assumption that the party did not have actual knowledge of the prior claim, — with such knowledge he would have actual notice. Constructive notice is a legal inference from established facts, and the inference is, or should be, always conclusive. In each of the several instances of constructive notice a subsequent purchaser or encumbrancer, *for reasons of public policy*, is charged by law with knowledge of a prior conflicting claim, and proof that the party did not have

such knowledge, or could not have had it, will not prevent him from being a party with constructive notice. A simple illustration is afforded by the recording acts. Upon proof that a mortgage was recorded it is conclusively inferred as a matter of law that all subsequent purchasers of the property have knowledge of the terms of such mortgage, although as a matter of fact the record may have been at once destroyed by fire so that actual knowledge thereof was unobtainable by an examination of the record.

The recognized instances of constructive notice are connected with each other by no common principle, but each rests upon its own peculiar foundation. Upon examination it will be found that practically all the instances of constructive notice are either statutory or are as much legal as equitable, and are therefore not strictly cases of notice in equity. It may be added that, with the exception of notice by registration, constructive notice is looked upon with disfavor by courts and legislatures. Courts of equity in modern times have refused to extend the doctrine of constructive notice, and two conspicuous instances of such notice, notice by possession and notice by *lis pendens*, have in some states been abolished by statute.

The several species of constructive notice which have been recognized by the authorities are as follows: (1) notice based upon actual knowledge of facts or circumstances putting one upon inquiry; (2) notice by possession of real estate; (3) notice by recitals or references in instruments constituting chain of title; (4) notice by *lis pendens;* (5) notice by registration, including registration of memoranda of *lis pendens* and of judgments; (6) notice to agent.

1. Notice based upon knowledge of facts or circumstances putting one upon inquiry has already been considered as a species of actual notice. Such it undoubtedly is where it is shown that the party made the inquiry and obtained actual knowledge of the prior claim. Where, however, there is no evidence as to whether or not the purchaser made any inquiry, or where it is shown that he fraudulently or negligently failed to make proper inquiry, many courts have held or declared that the purchaser is charged with constructive notice.

In the case where there is no evidence as to whether or not an inquiry was made, it seems to the writer to be most natural and reasonable to infer actual notice. This will probably in the great

majority of cases be in accordance with the fact. Probably most of the decisions and judicial *dicta* are to the effect that in this case actual notice is to be inferred. Mr. Pomeroy considers the notice actual or constructive according to the character of the facts putting the party upon inquiry. If they do not directly tend to show that information of the prior conflicting claim was personally brought home to the consciousness of the party affected, the notice is constructive, the court as a presumption of law inferring constructive notice; but if the facts do directly tend to show such information, the notice is actual, the jury or other tribunal argumentatively inferring actual notice as a conclusion of fact.[26] This distinction, which Mr. Pomeroy calls "plain and natural" seems to the writer impossible to apply in practice, for how is one to know when a fact tends directly to show that information was brought home to the party and when it does not so tend? The illustrations given by Mr. Pomeroy throw little light on this question.[27] It may be added that the confusion in the discussion of this species of notice is increased by regarding it sometimes as conclusive and sometimes as rebuttable constructive notice.[28]

Where it is shown that the subsequent purchaser fraudulently or negligently failed to make proper inquiry, there is more ground for saying that he has constructive notice. The law deals with him as if he actually had the knowledge which he would have obtained by inquiry, thus in effect imputing to him knowledge. But for the necessity of actual notice under some of the statutes, no harm would come from calling this constructive notice, or either con-

[26] POMEROY, § 596.

[27] In a note to § 596 Mr. Pomeroy enumerates as illustrating the distinction made in his text the familiar cases of constructive notice, namely, notice by possession and by recitals in title deeds, notice to agent, and notice by registration. In § 600 certain cases are cited as illustrating actual notice, and in § 611 the same cases are cited as illustrating constructive notice. In other words, certain facts directly tend to show that information was brought home to the party so as to charge him with actual notice, and the same facts do not directly so tend and hence constitute constructive notice. In § 610 the author says: "Whatever may be the language of judicial dicta, it is settled beyond a doubt that in one case the actual notice is argumentatively inferred as a conclusion of fact, by the jury or other tribunal, from the circumstances which put the party upon an inquiry; and in the other case the constructive notice is inferred by the court as a presumption or conclusion of law from the same kind of circumstances, in the absence of contrary evidence." The author's whole discussion of his "plain and natural" distinction is most difficult to follow.

[28] See POMEROY, §§ 606–608.

structive notice or imputed notice as is done in England. But as already pointed out, it seems better to hold that the purchaser has no notice but is estopped to set up the want of actual notice. He is not a purchaser in good faith. While calling this constructive notice, the courts give it the effect of actual notice.

In some states statutes defining notice class notice based upon facts putting one upon inquiry as constructive notice, but these statutes appear to have amounted to little in clearing up the subject.[29]

2. That the visible and notorious possession of real property constitutes notice to all the world of the rights of the occupant is well settled, and such notice is usually called constructive. This is undoubtedly the proper classification where the subsequent purchaser, without fault on his part, was ignorant of the fact of possession. In such case notice of all facts that might naturally have been learned by inquiry had the fact of possession been known, is imputed by law to the subsequent purchaser. Naturally very few such cases can be found. In practically every case a prospective purchaser knows or could easily find out who is in possession of the property. At all events he must assume that *someone* is in possession, and he ought to find out who that person is if he does not know. Otherwise he should bear the consequences should it happen that a stranger is in possession under a claim of right. Possession of land by a stranger is a most impressive fact putting one upon inquiry, and where the fact of possession is known, the case becomes the common one already considered of notice based upon such facts.[30]

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[29] For example, the Oklahoma statute provides:

"Sec. 10. Notice is either actual or constructive.

"Sec. 11. Actual notice consists in express information of a fact.

"Sec. 12. Constructive notice is notice imputed by the law to a person not having actual notice.

"Sec. 13. Every person who has actual notice of circumstances sufficient to put a prudent man upon inquiry as to a particular fact, and who omits to make such inquiry with reasonable diligence, is deemed to have constructive notice of the fact itself." (Wilson's Rev. & Ann., 1903, §§ 2788, 2789, 2790, 2791, sub-secs. 10–13.) As to the construction of Section 13, see Cooper *v.* Flesner, 24 Okl. 47, 103 Pac. 1016 (1909). According to the court in this case, the term "constructive notice" in this section means "implied actual notice." It is not clear how the situation is improved by a statute of this sort. As to a similar statute in California, see Prouty *v.* Devin, 118 Cal. 258, 50 Pac. 380 (1897).

[30] On possession as notice, see Holmes *v.* Powell, 8 DeG., M., & G. 572 (1856);

But in rare cases the subsequent purchaser may, without fault, be ignorant of the fact of possession. Such a case might arise, for example, where the property is a hotel or large rooming-house and the owner under an unrecorded deed occupies one or more rooms,[31] or where pending the purchase of land there is a sudden change of possession. In such a case a purchaser might be excusable for not learning of the possession. Nevertheless he would be charged with constructive notice of the occupant's rights. This is a harsh doctrine and has been abolished in some states by statute.

3. The rule that a purchaser of real property is chargeable with notice of every matter affecting the estate which appears by recital, reference, or otherwise upon the face of every instrument in his chain of title, is well established and this is a true case of constructive notice. It is immaterial that the purchaser did not know of these recitals, etc., or of the rights indicated by them. He is conclusively charged with notice of all the facts that might have been learned by inquiry along the lines indicated by the recitals and references. Of course if he actually knew of the recitals the case might become one of actual notice.

4. Notice by *lis pendens* is usually classed as constructive notice, and in so far as it is notice at all, this is the proper classification where the party affected did not actually know of the pendency of the suit. If he knew of the *lis pendens*, he is, of course, put upon inquiry, and the case comes under the head of actual notice. *Lis pendens* is perhaps better referred to the familiar rule of public policy upon which the doctrine is based, that there shall be finality in litigation, and not counted as a species of notice.[32] The doctrine of *lis pendens* is regarded as a harsh one and has been abolished by statute in some states. The notice afforded by its statutory substitute, registration of a memorandum of *lis pendens*, comes under the head of notice by registration.

5. Notice by registration requires no special comment. This is, of course, wholly statutory. It is, however, true constructive notice; it is immaterial that the subsequent purchaser did not know

Beattie *v.* Crewdson, 124 Cal. 577, 57 Pac. 463 (1899); Tate *v.* Pensacola, Gulf Land & Devel. Co., 37 Fla. 439, 20 So. 542 (1896); Kirkham *v.* Moore, 30 Ind. App. 549, 65 N. E. 1042 (1903); Vaughn *v.* Tracy, 22 Mo. 415, 25 Mo. 318 (1857); Maupin *v.* Emmons, 47 Mo. 304 (1871).

[31] Phelan *v.* Brady, 119 N. Y. 587, 23 N. E. 1109 (1890).

[32] Newman *v.* Chapman, 2 Rand. (Va.) 93 (1823).

or could not have known of the prior right, provided such right had been properly and legally made a matter of record. Independently of statute, judgments and decrees are not notice, except as to parties to the suit and purchasers *pendente lite*. Docketed judgments and decrees are generally made constructive notice by statute. This is merely an instance of notice by registration. Where a record has been actually seen by the subsequent purchaser, he is, of course, a purchaser with actual notice.

6. Notice to agent has from an early date been recognized in equity as notice to principal.[33] In the words of Lord Northington,[34] "it is a fixed and settled principle that notice to an agent is notice to the principal. If it were held otherwise it would cause great inconveniences, and notice would be avoided in every case by employing agents."

Notice to agent is by the American authorities almost universally called constructive notice to principal.[35] In England notice to agent is usually called either constructive or imputed notice, but, without regard to terminology, the English courts, so far as the writer knows, consider notice to agent in every respect the same as notice to the principal personally, actual notice to agent being treated as actual notice to principal.[36] So it was in the leading case of *LeNeve* v. *LeNeve*.[37] And although in England, the

[33] Merry *v.* Abney, 1 Ch. Cas. 38 (1663).

[34] Sheldon *v.* Cox, 2 Eden 224 (1764).

The same idea is expressed by Lord Brougham in Kennedy *v.* Green, 3 Myl. & K. 699, 719 (1834), when he says that, the "policy, and the safety of the public, forbids a person to deny knowledge while he is so dealing as to keep himself ignorant, or so as that he may keep himself ignorant, and yet all the while let his agent know, and himself, perhaps, profit by that knowledge."

[35] STORY, EQUITY JURISPRUDENCE, § 408; BISPHAM, § 268; POMEROY, § 669, n. 2. Mr. Pomeroy says: "There can be no greater misconception of its legal meaning, and no more complete confusion of the distinctions between the two kinds of notice, than to call the notice imputed to a principal through his agent, an 'actual' notice."

[36] "It has been held over and over again that notice to a solicitor of a transaction, and about a matter as to which it is a part of his duty to inform himself, is actual notice to the client. Mankind would not be safe if it were held that, under such circumstances, a man has not notice of that which his agent has actual notice of." *Per* Lord Hatherley in Rolland *v.* Hart, L. R. 6 Ch. 678, 681, 682 (1871).

[37] The case of LeNeve *v.* LeNeve, Ambler 436 (1747), arose under the registration act for the county of Middlesex providing that, "every such deed or conveyance that shall at any time after," etc., "be made and executed shall be adjudged fraudulent and void against any subsequent purchaser or mortgagee for valuable consideration, unless such memorial be registered as by this act is directed, before the registering

question of terminology seems to be academic, the propriety of calling notice to agent constructive notice to principal has been questioned. Thus Lord Chelmsford said:[38] "The notice, which a client is supposed to receive from his solicitor is generally treated as constructive notice. I think it would tend very much to clearness in these cases, if it were classed under the head of actual notice."

In this country the fact that the effect of actual and of constructive notice is ordinarily the same has usually rendered it unnecessary for the courts to make a discriminating examination of the question, and in most cases no harm has resulted from a wrong classification. But where it is necessary to establish the bad faith of the subsequent purchaser, and under registration statutes requiring actual notice of an unrecorded instrument, the distinction becomes vital. If actual notice to agent is only constructive notice to principal, one has but to employ an agent to avoid the effect of actual notice, and the inequitable result may be reached that a purchaser may acquire a perfect title to property subject to an unrecorded claim, although his agent, through whom the purchase was made, had full knowledge of the existence of such claim. This has actually happened.[39]

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of the memorial of the deed or conveyance under which such subsequent purchaser or mortgagee shall claim." The object of the suit was to enforce the execution of a marriage settlement executed by Edward LeNeve in 1718, but not registered as required by the statute. The defendants claimed under another settlement executed by LeNeve upon his second marriage in 1743, this settlement being registered. The second wife, at the time of her marriage, knew nothing of the first settlement, but her agent, who arranged the second settlement, had a copy of the first settlement and knew its terms, but did not communicate his knowledge to his principal. It was held that the first settlement should prevail over the second, notwithstanding the non-compliance with the statute. This decision was placed upon the ground that the second wife was not entitled to the protection of the statute because she purchased in bad faith, the knowledge of her agent being imputed to her. In so holding, Lord Hardwicke said: p. 446, "The taking of a legal estate after notice of a prior right, makes a person a *malâ fide* purchaser. . . . This is a species of fraud and *dolus malus* itself, for he knew the first purchaser had the clear right of the estate, and after knowing that, he takes away the right of another person by getting the legal estate." It will be observed that in this case, although the protection of the statute was not in terms limited to purchasers without notice, a purchaser with actual notice was not protected by it; further the actual knowledge of the agent was charged to the principal.

[38] Espin *v.* Pemberton, 3 DeG. & J. 547, 554 (1859). Lord Chelmsford says further: "I should therefore prefer calling the knowledge which a person has, either by himself or through his agent, actual knowledge; or if it is necessary to make a distinction between the knowledge which a person possesses himself, and that which is known to his agent, the latter might be called imputed knowledge."

[39] As in the Virginia case of Easley *v.* Barksdale, 75 Va. 274 (1881). This case

Such a doctrine is not only inequitable in operation but is unsound in principle. It is opposed to the philosophic foundation of the law of agency, including the rule that notice to agent is notice to principal. Several reasons for this rule have been assigned. One is the practical reason stated by Lord Northington, that otherwise one might avoid notice in every case by employing an agent. Another reason is found in the duty of the agent to communicate his knowledge to his principal and the legal presumption that he has performed this duty. This reason is unsatisfactory because this presumption is in many cases admittedly false in fact.

It would seem that the true foundation for the rule that notice to agent is notice to principal is the principle underlying the whole doctrine of agency, that, *quoad* the agency, agent and principal are one person. As has been aptly said, the agent is the *alter ego* of the principal. If in law agent and principal are one person, it follows that actual notice to agent is actual notice to principal; and even disregarding the fiction of identity, if it be admitted that what one does through an agent he does himself, it should equally be allowed that what one knows through an agent he knows himself. Philosophically and practically the only sound view is that actual notice to agent is actual notice to principal. This proposition has repeatedly received judicial support, either expressly or by necessary implication,[40] and the contrary decisions are extremely few.[41]

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arose under a statute providing that no *lis pendens* or attachment shall bind or affect a *bona fide* purchaser of real estate for valuable consideration "without actual notice" of such *lis pendens* or attachment, unless a memorandum thereof be left with the clerk of the court for record. An agent purchased for his principal land which was in litigation as was actually known to the agent but not to the principal. No memorandum was filed as specified by the statute, and it was held that the principal had only constructive notice and therefore got a good title. Oddly enough the court cited LeNeve *v.* LeNeve as authority. This decision seems clearly wrong, but was cited with approval by the Virginia court in the recent case of Steinman *v.* Clinchfield Coal Corp., 121 Va. 611, 93 S. E. 684 (1917).

[40] Actual notice to agent is actual notice to principal under statutes expressly requiring actual notice. Mayor of Baltimore *v.* Whittington, 78 Md. 231, 27 Atl. 984 (1893); Rhodes *v.* Outcalt, 48 Mo. 367 (1871); Hedrick *v.* Beeler, 110 Mo. 91, 19 S. W. 492 (1892); Cowen *v.* Withrow, 111 N. C. 306, 16 S. E. 397 (1892); Kirklin *v.* Atlas Sav. & Loan Assoc., 60 S. W. (Tenn.), 149 (1900). Also under a statute requiring actual notice in order to charge a subsequent purchaser with bad faith. LeNeve *v.* LeNeve, Ambler 436 (1747).

[41] See Easley *v.* Barksdale, 75 Va. 274 (1881). This is the only case found by the writer in which notice to agent was held to be constructive and not actual notice to principal, where the decision turned upon this distinction.

It may be added that where nothing depends upon it, it is neither unnatural nor improper to call actual notice to agent constructive notice to principal, for it is only by construction of law that agent and principal are one person, and by construction, therefore, that the acts and knowledge of the agent are the acts and knowledge of the principal. The full statement of this notion, however, is that, since by construction of law agent and principal are one, by construction of law actual notice to agent is actual notice to principal. The more compact form of statement should never be employed at the expense of justice and in disregard of sound equitable principles.

Summing up: Notice in equity is knowledge of a fact either actually possessed by a person or imputed to him by law. Notice is either actual or constructive, but as a purely equitable concept is primarily and properly actual notice, the foundation of which is actual knowledge. Actual notice in equity of a prior interest, claim, or right is actual knowledge thereof, either in fact possessed by the party to be charged or by his agent, or which but for the fault of such party or agent might have been so possessed.

Notice is a fact to be proved, like any other fact, by evidence. Notice may be proved either (1) directly, by evidence bringing the fact of knowledge of the prior claim home to the party, or (2) indirectly, by circumstantial evidence. Actual notice may be inferred, as a matter of fact, from proof of circumstances showing that the party had the opportunity to learn of the existence of the outstanding claim, or of circumstances of general notoriety pointing to the existence of such claim, or from proof that the party knew of facts or circumstances sufficient to put a reasonable man upon inquiry as to whether or not there was some prior adverse claim to the property in question, which facts or circumstances, if investigated, would probably have led to actual knowledge of the prior claim. Upon proof that the party knew of such facts or circumstances, it will be inferred, in the absence of other evidence, that he made the investigation and actually learned of the prior claim and thus had actual notice thereof. But if it be shown that he made such investigation with due diligence, but nevertheless failed to learn of such claim, he will be held to be without notice. If, however, it be shown that he wilfully or negligently failed to make such investigation and therefore did not learn of the prior claim,

he will be dealt with as if he had had actual notice. In such case, while strictly speaking without notice, he has not acted in good faith and also he will be estopped to set up the want of notice.

Notice to agent, within certain well recognized limits, is notice to principal, and in equity notice to agent has, within these limits, precisely the same effect as notice to principal, actual notice to agent being actual notice to principal.

Besides notice proper, there are several cases of so-called constructive notice. Constructive notice is notice imputed by law, and is wholly independent of knowledge; indeed there can be true constructive notice only in the absence of knowledge, with knowledge the party would have actual notice. The cases of constructive notice are few and special and each rests upon its own peculiar ground. These cases are (1) notice by possession of real estate, where such possession is not known to the party charged with notice; (2) notice by recitals in title deeds; (3) notice by *lis pendens;* and (4) notice by registration. With the exception of notice by registration, which is statutory, none of these cases of constructive notice are of much importance, and the first and third have in some states been abolished by statute.

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